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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1095.

THE PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

VS.

P. L. MILLER, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

J. P. Cox, Jr.,
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A. F. Nossaman,
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

P. L. Miller, respondent, respectfully prays that the issuance of the writ of certiorari be denied, the application therefore being wholly without merit.

SUMMARY STATEMENT.

The parties will for clarity be called "carrier" and "shipper."

The carrier admits in the record that it failed to perform its contract of carriage to safely transport shipper's property and that it negligently destroyed three cars of onions entrusted to its care.

The carrier admits that the shipper promptly filed his claim covering such loss.

The carrier admits wrongfully to have refused payment of these admittedly just claims.

The shipper in view of the smallness of the claims and the prohibitive expense of litigation, did not file suit seeking an affirmative recovery of his loss.

The carrier admits that had it filed suit against the shipper within the two year period, that the shipper under the authority of *Chicago & North Western Ry. Co. v. Lindell*, 281 U. S. 14, 17, could have filed an affirmative cross action and under the admitted facts probably would have recovered from it a substantial judgment, over and above the carrier's claim for deficiency in the freight.

The carrier admits that it waited until the expiration of the two year period prescribed in the bill of lading for the filing of suit by the shipper for affirmative recovery, the carrier believing that it could thereafter maintain this action against the shipper and thereby cut off the equitable defense of recoupment, and impose upon the shipper the double loss of the value of his property in addition to the freight charges.

The record discloses, that upon the filing of the shipper's answer in the trial court, pleading that—

> "Plaintiff is not entitled to recover from defendant the loss resulting from its own negligence and failure to perform the contract of carriage,"

and setting up such loss, *not as a cross-action*, but purely as a defense by way of equitable recoupment, that the carrier then pled the two year contractional limitation in the bill of lading and the two year Texas Statute of Limitations.

The foregoing facts were admitted as shown by the Transcript of Record Page 14, in which the carrier admits that no question is raised as to the sufficiency of the pleading and proof in support of the shipper's claim that the carrier negligently destroyed his property.

The carrier further affirmatively admits in his application for certiorari that—

> "No question was raised in the Circuit Court of Appeals as to the sufficiency of respondent's evidence in support of his claim for damages" (P. 7).

FIRST COUNTER POINT.

Neither preference, discrimination, nor lack of uniformity in freight rates results from permitting the equitable defense of recoupment, under the admitted facts presented in this cause.

STATEMENT, AUTHORITIES AND ARGUMENT.

In taxation the absolute freedom from preferences and discriminations and the requirement that all taxes shall be uniform throughout the United States are Constitutional requirements (Art. I, Sec. 8).

If the equitable application of the principles of recoupment is obnoxious to these Constitutional requirements, *then the defense of recoupment would necessarily be denied in all tax matters.*

That this defense does not create preferences, or cause discrimination, and does not militate against uniformity in cases where uniformity is required is conclusively shown in the following decisions which have permitted this defense in tax matters.

These decisions are:

Bull v. *United States,* 295, U. S. 247, 55 S. Ct. 695.

Dixie Margarine Co. v. *Commissioner of Internal Revenue,* 115 F. 2d 445.

Crossett Lumber Co. et al. v. *United States,* 87 F. 2d 930.

SECOND COUNTER POINT.

The bill-of-lading does not, by its terms, preclude the defense of abatement or recoupment.

STATEMENT, AUTHORITIES AND ARGUMENT.

The existence of a Federal Statute (Revenue Act of 1928, Section 610) forbidding the refunding of taxes except where suits are filed within a prescribed time limit

and using such mandatory language as "but *only* if such suit is begun within two years, etc." does not, even in an action at law, preclude the defendant from interposing the equitable defense of recoupment where the defendant has not been guilty of such laches as would make the defense inequitable.

The following cases we think support the above ruling:

Dixie Margarine Co. v. *Commissioner of Internal Revenue*, 115 F. 2d 445.

Crossett Lumber Co. et al. v. *United States*, 87 F. 2d 930.

Bull v. *United States*, 295 U. S. 247, 55 S. Ct. 695.

The bill of lading neither expressly nor impliedly limits the time wherein the defense of breach of contract and abatement may be interposed against the carrier's action for the collection of freight charges. It does not deny the shipper the equitable defense of recoupment.

The bill of lading merely limits the time in which:

(a) Claims may be filed;

(b) In which suits may be instituted.

The prefacing sentence in the provision of the bill of lading relied upon by the carrier is;

"As a condition precedent to *recovery*."

Then follow provisions merely limiting the time in which:

(a) Claims may be filed;

(b) In which suits may be instituted.

The bill of lading further provides:

> "Where claims are not filed '*or*' suits not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable and such claims will not be paid."

The carrier on page 12 of its brief in the Circuit Court re-writes this provision and suggests that it should be made to read as follows:

> "No liability exists if there is a failure to either present the claims in writing within nine months after delivery, or if the suit is not instituted thereon within the time stipulated. In either case there is no liability."

It would have been a simple matter for the carrier to have so worded the contract had it so desired but it did not.

Instead the requirement regarding the filing of claims and the institutions of suits is written in the alternative.

The word "or" is used and not the word "and."

We construe the word "or" to mean, "one or the other."

This construction of the word "or" is supported by an opinion of the Supreme Court of Texas in the case of *Shell Petroleum Corporation* v. *Royal Petroleum Corporation et al.*, 137 S. W. 2d 753.

Giving the words used in the contract their ordinary meaning it is quite clear that it is provided that the carrier shall not be liable unless the shipper does one or the other of the two things required.

The shipper must either file his claims within the time specified or he shall file suit within two years and one day from the date of the rejection of the claim.

It does not provide that the shipper shall do both.

The shipper did file his claims within the required time. Thus the carrier was put on notice of the shipper's claim that the carrier had negligently destroyed the commodity and that the carrier's negligence was the cause of the loss.

The carrier therefore is placed at no disadvantage and it is not prejudiced by the failure of the shipper to file suit and there is no inequity in permitting the carrier to plead as a defense the breach by the carrier of the

carrier's contract to transport the commodity safely and the loss which resulted by such breach.

Besides, the shipper has not asserted the carrier's liability in the sense that an affirmative claim had been made for loss and damage.

The gist of the defense is that the carrier who occasioned the loss by its own negligence should not be permitted to collect such loss from the shipper, whose commodity the carrier destroyed.

In its brief in the Circuit Court (Page 32) the carrier admits that Sections one and two of these conditions are provisions as to filing claims and institution of suits.

The carrier admits that these provisions do not deal with the question that we have here—of abatement by way of recoupment.

"Recoupment" is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded, and is never barred by limitation so long as the main action itself is timely.

The Circuit Court of Appeals, Fifth Circuit, in the case of *Webb* v. *American Surety Company of New York*, 88 F. 2d 171, held—

> "A barred recoupment may defeat a claim but may not be made the basis of a judgment for the excess."

That court in the same case further held—

> "I think this suit is one essentially in equity, requiring the equitable application of the principles of recoupment and set-off and the granting of equitable relief (Citing authorities). In such a case statutes of limitations are applied by analogy as laches, but only where the facts make it inequitable not to do so (Citing authorities)."

The Supreme Court of the United States in the case of *Bull* v. *United States*, 295 U. S. 247, 55 Sup. Ct. Rep. 695, 79 L. Ed. 1421, held:

> "If the claim for income tax deficiency had been the subject of a suit, any counterclaim by recoupment of the over payment of a state tax could have been asserted by way of defense and credit obtained, notwithstanding the statutes of limitation had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the Statute of Limitation so long as the main action itself is timely."

Other cases holding that such defense is never barred by the Statute of limitations, so long as the main action itself is timely, are:

Williams v. *Neely*, (C. C. A.) 134 Fed. 1, 69 L. R. A. 232.

Conner v. *Smith*, 88 Ala. 300, 7 So. 150.

Stewart v. *Simon*, 111 Ark. 358, 163 S. W. 1135, Ann. Cas. 1196A, 825.

Beecher v. *Baldwin*, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57.

Blackshear v. *Dekle*, 120 Ga. 766, 48 S. E. 311.

Aultman & Co. v. *Torrey*, 55 Minn. 492, 57 N. W. 211.

Kaup v. *Schinstock*, 88 Neb. 95, 129 N. W. 184.

Campbell v. *Hughes*, 73 Hun. (N. Y.) 14, 25 N. Y. S. 1021.

In *Crossett Lumber Company et al.* v. *United States*, 87 F. 2d 930, it was asserted that because of the emphatic and mandatory language of the Revenue Act of 1928, Section 610, wherein it is provided that recovery of amounts erroneously refunded may be recovered by suit brought in the name of the United States but only if such suit is begun within two years after the making of such refund, that in a taxpayer's suit brought to recover an over assessment of income tax the United States Government could not plead the erroneous refund because it had not filed suit within the statutory period.

The Circuit Court overruled this contention using the following language:

> "In the case at bar one act, the erroneous valuation of the inventory of November 30, 1926, set in motion a course of events resulting in the erroneous refund to the taxpayer on one hand, and an overassessment in his favor on the other. Had the Government, within the time limited, brought an action to recover the refund, made erroneous by the inventory, the taxpayer could have set up by way of defense its overpayment of income tax of the following years, induced by the same erroneous inventory. There is a direct connection in this case between income taxes paid in successive years based upon a single erroneous inventory as there was between the estate tax erroneously determined and income tax correctly determined on the same item in *Bull* v. *United States*, *supra*. That being the situation, it is immaterial that the parties are reversed and the taxpayer is bringing the suit. In *Bull* v. *United States*, 295 U. S. 247, at page 262, 55 S. Ct. 695, 701, 79 L. Ed. 1421, the court said:
>
> > 'The circumstance that both claims, the one for estate tax and the other for income tax, were prosecuted to judgment and execution in summary form does not obscure the fact that in substance the proceedings were actions to collect debts alleged to be due the United States. It is immaterial that in the second case, owing to the summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which, if the United States had sued him for income tax, he could have recouped against his liability on that score.'
>
> Neither is it material in the instant case that the action by the appellant was delayed until the Government's right of action was tolled.

> 'Such a defense is never barred by the statute of limitations so long as the main action itself is timely.'

Bull v. *United States*, 295 U. S. 247, at page 262, 55 S. Ct. 695, 700, 79 L. Ed. 1421."

The Supreme Court of Alabama in the case of *Conner* v. *Smith*, 88 Ala. 300, 7 So. 150, speaking of recoupment said:

> "So long as the contract, upon a breach of which the claim is predicated, subsists, and may be enforced, the claim itself may be pleaded in reduction, at least, of the demand on the contract; and this, notwithstanding the matter of recoupment, independently considered, may be barred, not only when it is pleaded, but also when the right of action, against which it is asserted, accrued. Wood, Lim., pp. 602, 603, Sec. 282."

The Supreme Court of the United States in *Bull* v. *United States*, 295 U. S. 247, referred to the above Alabama case as authority on this proposition.

In the case of *Cleveland Clinic Foundation* v. *Humphries*, 97 F. 2d 849, the Sixth Circuit Court of Appeals held the following:

> "Her answer set up a plea of recoupment which denies the validity of the defendant's claim for the full amount. It was not an independent cross-claim but was confined to matters arising out of or connected with the transaction which formed the basis of the defendant's crossbill. It goes only in reduction of defendant's claim, and can be used as a cross-action only to the extent of their demand. Judgment cannot be obtained by plaintiff for any balance in her favor against the defendants. The Statute of Limitation has no application."

Many other authorities might be cited, but we believe the above amply support our position that the shipper has the right to plead and prove loss and damage

arising from the breach of the very contracts that plaintiff made the basis of its suit for the purpose of recoupment, that is, to offset the claim for deficiency freight.

At common law, in recoupment, claim of defendant must arise out of transaction that constitutes plaintiff's cause of action and may rest in tort or contract or be for liquidated or unliquidated damages.

Merry Realty Co. v. *Shamokin & Hollis Real Estate Company*, 174 N. Y. S. 627.

Luther v. *Mathis*, 211 Ill. App. 596.

Raymond v. *State*, 54 Miss. 562, 28 Am. Rep. 382.

J. C. Lysle Milling Co. v. *N. Alabama Grocery Company*, 77 So. 748, 201 Ala. 222.

Amori Independent Telephone Company v. *Cox*, 60 So. 641, 103 Miss. 541.

The term "recoupment" is defined in R. C. L. as follows:

> "At common law it is the right of the defendant, in the same action, to claim damages from the plaintiff either because he has not complied with some cross-obligation of the contract on which he sues, or because he has violated some duty which the law imposes upon him in the making or performance of that contract, 24 R. C. L. 793; the doctrine under which in an action for breach of contract the defendant may show that the plaintiff has not performed the same contract on his part and may recoup his damages for such breach in the same action whether liquidated or not." 16 R. C. L. 942.

The carrier admits in its brief in the Circuit Court (Page 32) that the bill of lading contains no provision denying the equitable defense of recoupment, the brief asserting that:

> "No exception of any kind was made, *e. g.*, the off-setting of transportation charges against a claim for damages where the latter has not been asserted within the time allowed."

Because there is no contractual restriction denying the shipper the right to thus defend, the carrier urged (Page 32) Circuit Court Brief,

> "It is obvious that if such an exception had been intended, then the sentence above quoted from section 2(b) of the conditions would have contained specific provisions to that effect. Certainly such an exception cannot arbitrarily be read into the contract, etc."

The difficulty with the carrier's line of reasoning is that it is in conflict with the well established rule by which the provisions of a bill of lading are construed.

In 10 Corpus Juris, page 181, Section 234, this rule is stated:

> "As restrictions of carrier's liability in receipts or bills-of-lading drawn up and executed by it are for its benefit and are interposed for the purpose of escaping a liability which would otherwise be imposed by law, they are to be strictly construed as against the carrier and in favor of the shipper."

In the case of *Indiana Harbor Belt R. Co.* v. *Jacob Stern & Sons*, 37 Fed. Supp. 690, this rule was stated as follows:

> "Even if we regarded this tariff as capable of two interpretations, certain well-recognized rules of tariff interpretation would require us to select the interpretation above made. Tariffs are written by the carriers. It is presumed that they have used all the words necessary to protect their own interest. Therefore, it is the rule, followed by the courts and the Commission, in doubtful cases, to adopt that interpretation of the tariff which is most favorable to the shipper. *United States* v. *Gulf Ref. Co.*, 268 U. S. 542, 45 S. Ct. 597, 69 L. Ed. 1082."

This rule of construction is further stated:

> "A bill of lading having been prepared by the carrier is to be construed most strongly against it.

> *Lehigh Valley Transp. Co.* v. *Post Sugar Co.*, 128 Ill. Atl. 600 (affm. 228 Ill. 121). Any reasonable doubt as to the proper construction of the printed portion of a bill of lading should be resolved against the carrier which prepared it, as it chose the language (affm. 142 Fed. 667, 74 C. C. A. 245); *American Roofing Co.* v. *Memphis, etc., Packet Co.*, 8 Oh. S. & C. P. 490, 5 Oh. N. P. 146; 10 Corpus Juris 195, Note 58."

The Supreme Court of Texas, speaking through the Commission of Appeals in the case of *Gulf, C. & S. F. Ry. Co.* v. *Hines et al.*, 250 S. W. 1013, Par. 5, held:

> "It is a well established rule under federal authorities that, if there be any reasonable doubt as to the proper construction of a bill of lading, it should be resolved against the carrier."

Also see *E. Gerli & Co.* v. *Cunard S. S. Co.*, 48 F. 2d 115; *Texas, etc., R. Co.* v. *Reiss*, 183 U. S. 621; *The Queen of Pacific*, 180 U. S. 49.

As the carrier is at common law, as well as under the transportation act, liable for loss and damage arising from its breach of contract to transport safely the merchandise entrusted to its care, such liability remains fixed unless expressly denied by the term of the carriage contract.

Under the foregoing rule, the carrier having written the contract for the express purpose of escaping liability and having failed to put in the contract a clause denying the shipper the right to plead defensively the breach of the carrier contract and the resultant loss, in abatement by way of recoupment, we think that it should be presumed that the carrier did not intend to bind the shipper in that respect.

Where the shipper's loss, caused by the carrier's negligence is less than, or equivalent to, the freight charges, the shipper should be permitted to forego expensive and unprofitable litigation and should not be required to file a suit against the carrier in order not to waive his right

to interpose the equitable defense of recoupment, should the carrier file a suit against him after the expiration of the two years and before the termination of the three year period in which the carrier has to file its suit.

The shipper should have the right to elect whether it should file an affirmative action for the entire loss sustained by the carrier's negligence or decline to be involved in a suit against the carrier, without waiving his defense should the carrier sue.

THIRD COUNTER POINT.

A bill of lading is a "written contract" within the meaning of the four year statute of limitations (Revised Civil Statutes of Texas, Article 5527). The two year Statute of Limitations relied upon by the carrier has no application.

STATEMENT, AUTHORITIES AND ARGUMENT.

The Supreme Court of Texas in the case of *Texarkana and Ft. S. Railway Company et al.* v. *Houston Gas and Fuel Company*, 51 S. W. 2d 284, expressly holds that claims against carriers arising from a bill of lading are not barred by the two year statute but such suits come within the four year statute.

It therefore follows that the Texas Statutes of Limitations and the various constructions placed upon those statutes by the Texas Courts are not material to any issue involved in this appeal.

The sole and only issue is whether the facts involved in this suit equitably call for the application of the doctrine of recoupment.

It would be hard to conceive of a case more strongly calling for the application of the rule.

CONCLUDING REMARKS.

The distinction between the limitation as to the time of the filing of suit and the right to interpose the equitable defense of recoupment is further discussed in *Dixie Margarine Co.* v. *Commissioner of Internal Revenue,* 115 F. 2d 445, by the Circuit Court of Appeals, Sixth Circuit, in which case the taxpayer had filed a suit in the Court of Claims (12 Fed. Supp. 543) for recovery of $87,412 illegally exacted from him. A demurrer was sustained because the amount was not refundable, the same being barred by the four year Statute of Limitations. The Court of Claims holding—

> "The amounts refunded, however, did not include $87,412 which had been paid by plaintiff between March 15, 1923, and December 1, 1925, and this action is for the recovery of that amount.
>
> "Section 3226 of the Revised Statutes, as amended (26 U. S. C. A. Secs. 1672-1673) provides in part that
>
> > 'No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof.'
>
> And Section 3228 of the Revised Statutes, as amended (26 U. S. C. A, Sec. 1433), provides that
>
> > 'All claims for the refunding or crediting of internal-Revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected

> must * * * be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.'
>
> * * * * * * *
>
> "It was not legally refundable because the statute prohibited the Commissioner from refunding or crediting any tax unless claim therefor was filed within four years after payment. Legally he could not refund the tax paid back of that period.
>
> * * * * * * *
>
> "The facts show that the plaintiff had paid, beyond the statutory period for refunds, amounts it should not have paid but this court has no jurisdiction to entertain a suit for the recovery of these amounts. Any relief to which plaintiff may be entitled must come from the Congress.' "

Petitioner then filed an application for writ of certiorari in the United States Supreme Court which petition was denied (297 U. S. 713).

Later the Commissioner of Internal Revenue filed a deficiency assessment in the amount of $16,775.60 against the taxpayer on income tax. The taxpayer then set up the defense of recoupment based upon the $87,412, recovery of which was denied him in an affirmative action to recover.

It was held by the Circuit Court that notwithstanding the suit the taxpayer had instituted for recovery of this amount, and notwithstanding the fact that recovery was denied the taxpayer because of the Statute of Limitations, this item nevertheless could be asserted in abatement in the form of the equitable defense of recoupment.

The petitioner misconstrued the opinion of The Circuit Court on Page 16 of the application wherein fear is expressed that "Carried to its extreme, the opinion of the majority below would permit a shipper to assert a claim for damages by way of recoupment in defense of the carrier's action for freight charges although a claim had never been filed with the carrier as required by the bill

of lading, etc.," and would deprive the carrier from ascertaining its liability before the means of proof should be lost.

That the opinion of the Circuit Court makes no such holding is too plain for that argument to be presented here.

The opinion expressly precludes any such interpretation the facts being clearly stated and the law very correctly, in our opinion, pronounced.

The opportunity of a carrier to manipulate its litigation and to maneuver a shipper into a position such as this carrier has attempted to place this shipper, is not such a right as should be protected by the courts of the land, nor is a denial of such an opportunity a matter of sufficient public importance to warrant this court in accepting jurisdiction of this small lawsuit.

We respectfully urge that the application be denied.

Respectfully submitted,

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